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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a
Delaware corporation,

Petitioner,

v.

DSD DISTRIBUTORS, INC., a Wisconsin
corporation

Respondent.

CASE NO. 08-CV-0619 LAB (RBB)

**HANSEN BEVERAGE COMPANY'S
OPPOSITION TO MOTION TO DISMISS
OR STAY PETITION TO CONFIRM
ARBITRATION AWARD**

Date: June 9, 2008

Time: 11:15 a.m.

Hon. Larry A. Burns

1.

SUMMARY OF OPPOSITION

3 Petitioner Hansen Beverage Company ("Hansen") filed this action on April 4, 2008 to
4 confirm a Final Award issued by the Arbitrator, Retired Judge J. Richard Haden, in San
5 Diego, California on April 4, 2008. Respondent DSD Distributors, Inc. ("DSD") seeks to
6 dismiss or stay this action, contending (erroneously) that the amount in controversy is "zero"
7 and that the appropriate forum for post-arbitration proceedings (including DSD's attempt to
8 reopen the Final Award and resume chasing a substantial damage award) is Wisconsin.

9 DSD's motion fails on all fronts. Subject matter jurisdiction exists because the parties
10 are diverse (an undisputed fact) and the amount in controversy—the pecuniary value of the
11 Final Award—exceeds the jurisdictional threshold. Abstention or deferral to proceedings in
12 Wisconsin is not appropriate because review of the Final Award implicates **California's**
13 strong public policy concerning arbitration. Further, DSD's action in Wisconsin—on which
14 it relies for its “first filed” argument—was initiated in flagrant contravention of its undisputed
15 contractual obligation to arbitrate. Finally, the Wisconsin court has formally deferred to **this**
16 **Court** for action on the Final Award.

11

RELEVANT FACTS AND PROCEDURAL HISTORY

19 A. The Parties' Written Agreement to Arbitrate

20 In December 2004, DSD signed a written Distribution Agreement (the "Distribution
21 Agreement") with Hansen, pursuant to which the parties agreed to arbitrate **in California**¹
22 any and all disputes arising out of the Distribution Agreement. See, a copy of the
23 Distribution Agreement, § 19, Exhibit 2 to the Declaration of Tanya M. Schierling In Support
24 of Petition to Confirm Arbitration Award and *Ex Parte* Application To File Document Under
25 Seal, previously filed on April 4, 2008 ("Schierling Decl. #1"). Arbitration is to be

¹ Though Hansen is incorporated in Delaware, as the Distribution Agreement evidences, Hansen operates out of its headquarters in Corona, California.

1 conducted by JAMS/Endispute ("JAMS"). *Id.*

2 When disputes arose between the parties in or about April 2007 concerning potential
 3 termination of the Distribution Agreement, Hansen commenced arbitration with JAMS in
 4 Orange County, California, in accordance with the Distribution Agreement's express terms.
 5 Schierling Decl. #1, ¶ 2.

6 **B. DSD's Attempted End-Run Around Arbitration**

7 DSD tried its best to avoid its obligation to arbitrate. In July 2007, DSD filed suit in
 8 the Circuit Court for Rock County, Wisconsin (the "Wisconsin Court Action"), seeking
 9 declaratory and injunctive relief against Hansen for claims arising out of the Distribution
 10 Agreement. See, a copy of DSD's Complaint in the Wisconsin Court Action, Exhibit 2 to the
 11 Declaration of Tanya M. Schierling In Support of Hansen Beverage Company's Opposition
 12 to the Motion to Dismiss or Stay ("Schierling Decl. #2"). Hansen defeated DSD's ill-
 13 conceived effort, pointing out to the Wisconsin court that, pursuant to the Distribution
 14 Agreement, DSD had no right to bring its claims into court. Instead, DSD had contractually
 15 agreed to resolve any such claims in arbitration.

16 The Wisconsin court agreed and issued an order staying that action to permit
 17 arbitration. See Exhibits "C" and "D" to the Declaration of Leila Nourani filed in this action
 18 ("Nourani Decl."), copies of Hansen's Motion to Dismiss or Stay the Wisconsin Court Action
 19 and the court's Order granting the motion. Notably, contrary to DSD's creative
 20 interpretation of the record, Hansen did not seek (and the Wisconsin court did not issue) any
 21 order compelling DSD to arbitrate its claims or referring those claims to the arbitration then
 22 pending in California. (Indeed, it is doubtful that the Wisconsin state court even had the
 23 jurisdictional reach to compel a party to arbitrate *in California*.) DSD then brought its
 24 affirmative claims against Hansen in the arbitration.

25 **C. The Arbitration Proceedings**

26 The parties selected and JAMS appointed Judge J. Richard Haden, Ret., as Arbitrator.
 27 Judge Haden is based out of JAMS' San Diego office and, thereafter, all arbitration
 28 proceedings were conducted at the JAMS San Diego office. Schierling Decl. #1, ¶¶ 4-7.

1 The evidentiary hearing took place in January 2008 over a period of four days and,
 2 following post-hearing briefing, Judge Haden issued his Final Award on April 4, 2008.
 3 Schierling Decl. #1, ¶ 8 and Exhibit 1 thereto, a copy of the Final Award, filed under seal.

4 **D. The Final Award in Arbitration**

5 In pertinent part, the Final Award decided, in DSD's favor, that DSD's distributorship
 6 could not be terminated by Hansen. DSD valued its existing Hansen distribution rights at
 7 approximately \$850,000. Schierling Decl. #2, ¶¶5-6 and Exhibit 4 thereto, a copy of DSD's
 8 Expert Report entitled "Calculation of Damages to DSD Distributors, Inc. Resulting From
 9 Loss of the Right to Distribute Products of Hansen Beverage Company" ("DSD's Expert
 10 Report"), filed under seal. It is quite troubling, therefore, that DSD represents to this Court
 11 that the value of the Final Award in its favor on this claim is "zero."

12 To be sure, the Final Award denied DSD's prayer for monetary damages for
 13 termination of the Distribution Agreement, finding that Hansen had not actually or
 14 constructively terminated the parties' distribution relationship or agreement. But, critically,
 15 the Final Award also affirmatively pronounced DSD's entitlement to the protections of a
 16 Wisconsin statute, the Wisconsin Fair Dealership Law ("WFDL"), denying Hansen the
 17 commercial right and freedom to terminate the Distribution Agreement as it was entitled to
 18 do under the express terms of the Distribution Agreement and California law (the choice-of-
 19 law provided in the Distribution Agreement²). This dispute—whether DSD enjoys the
 20 protections of the WFDL—was a hard-fought battle; a cause that DSD championed and
 21 continues to champion to this day³; and a contested issue that both parties expended
 22 considerable, if not the majority, of their resources and time on in discovery and during the
 23 proceedings. Surely DSD would not have gone to such lengths to vindicate rights that have
 24 no value.

25
 26 ² See Distribution Agreement, § 18, Exhibit 2 to Schierling Decl. #1.

27 ³ DSD's motion here proclaims, "Wisconsin law is extraordinarily protective of distributors and dealers.
 This is manifested in the Wisconsin Fair Dealership Law ('WFDL') and then proceeds to detail the
 purposes and protections of that statute. DSD's Motion, at 2-3.

E. DSD's Failed Post-Award Challenge in the Wisconsin Court Action

DSD has continued its fight to capitalize on its rights under the WFDL. Unhappy with the Arbitrator's findings that Hansen has not terminated the Distribution Agreement and therefore DSD has suffered no damages (which DSD claimed exceeded \$2 million), DSD asked the Wisconsin court to overrule the Arbitrator and issue contrary findings. On April 4, 2008 (the day the Final Award was issued and the day Hansen filed its petition to confirm in this Court), DSD filed a motion in the Wisconsin Court Action seeking partially to vacate the Final Award. See Exhibit 1 to Schierling Decl. #2, a copy of DSD's motion for partial vacation. DSD sought only partial vacatur, of course, because it wishes to preserve the Final Award's valuable determination that DSD is entitled to WFDL protections. That determination is the cornerstone and predicate to the further relief DSD sought.

On April 30, 2008, apprised of Hansen's petition in this action, the Wisconsin court issued a ruling declining to entertain DSD's motion, ***specifically and formally deferring to this Court.*** See Exhibit 3 to Schierling Decl. #2, a copy of Judge Forbeck's April 30 ruling. Judge Forbeck stated definitely: "the arbitration should be completed and finalized in the Federal Court in the State of California without intervention of this Court."

Of course, DSD has the unfettered right, and Hansen fully expects DSD, to assert in this action the same challenges to the Final Award that it attempted to raise in the Wisconsin court. The relief DSD seeks—overturning the Arbitrator’s denial of damages and, instead, entering an award of damages in accordance with DSD’s expert’s testimony (approximately \$1.7 Million⁴)—only further reinforces the conclusion that the “amount in controversy” in this action satisfies jurisdictional requirements.

III.

THIS COURT HAS SUBJECT MATTER JURISDICTION

⁴ DSD's expert valued its existing distribution rights at approximately \$850,000. He then added an additional approximately \$850,000 to the damage figure for the value of expanded distribution rights covering new products Hansen introduced to the marketplace in April 2007, but which Hansen had not appointed DSD to distribute. Schierling Decl. #2, ¶¶ 5-6 and Exhibit 4 thereto, a copy of DSD's Expert Report.

1 It is undisputed that the parties are diverse. DSD only contends that the action does
 2 not satisfy the \$75,000 amount in controversy requirement for diversity jurisdiction. DSD's
 3 argument is transparent and wrong. The amount in controversy, established by DSD's own
 4 evidence, is at least \$850,000.

5 **A. The Amount of the Award**

6 In *Goodman v. CIBC Oppenheimer*, 131 F.Supp. 2d 1180 (C.D. Cal. 2001), the
 7 United States District Court for the Central District of California held that for purposes of a
 8 petition to confirm or vacate an arbitration award, "the amount in controversy is the amount
 9 of the award." *Id.* at 1184. The Court rejected the petitioner's argument that the amount in
 10 controversy is the original amount sought in arbitration. *Id.*⁵ The petitioner in *Goodman*
 11 had sought \$3,000,000 in damages in the arbitration proceedings, but was awarded only
 12 \$74,000 and change. *Id.*

13 Unlike this case, however, *Goodman* did not involve an arbitration award that, in
 14 addition to deciding claims for monetary recovery, also issued significant and valuable
 15 declaratory relief. It is well settled that the amount in controversy on a declaratory relief
 16 claim "is measured by the value of the object of the litigation." *Hunt v. Washington State*
 17 *Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977); accord *Sanchez v. Monumental Life*
 18 *Ins. Co.*, 102 F.3d 398, 405, n.6 (9th Cir. 1996). Pursuant to this analysis, the amount of the
 19 Final Award here is not zero. Though the Final Award awards DSD nothing on its damages
 20 claim, it also affirmatively declares that, because DSD met the fact-intensive definition of a
 21 "dealer" under the WFDL, DSD's distributorship may not be terminated by Hansen on the
 22 grounds asserted by Hansen. Otherwise Hansen could have terminated DSD pursuant to the

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24 ⁵ Notably, no controlling Ninth Circuit opinion has declared this rule of decision. In *Theis Research, Inc. v. Brown & Bain*, 400 F.3d 659, 664-665 (9th Cir. 2004), the Ninth Circuit decided that because the plaintiff sought to reopen the arbitration award by relitigating the same claims in court, the amount in controversy was the amount at issue in the underlying arbitration. The court noted, "*[i]f* we measure the amount in controversy . . . by the amount of the arbitration award, the district court lacked subject matter jurisdiction." *Id.* at 661 (emphasis added). But the court then determined on, based on the facts of that case, that the proper measure of the amount in controversy **was not** the amount of the arbitration award.

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1 terms of the Distribution Agreement and California law, to DSD's significant, admitted
 2 financial detriment. The value of the right to not be terminated? According to DSD's
 3 evidence, it is at least \$850,000, well above the amount in controversy requirement.

4 **B. The Amount of DSD's Challenge to the Final Award**

5 Even if the value of the "amount of the award" were zero (which it is not), the amount
 6 in controversy requirement is nevertheless satisfied because DSD seeks to reopen the
 7 arbitration and obtain a damage award of approximately \$1.7 Million. See *Theis Research,*
 8 *Inc. v. Brown & Bain*, 400 F.3d 659, 664-665 (9th Cir. 2004), and cases cited therein. In
 9 *Theis*, the Ninth Circuit cited and relied on decisions from other circuits holding that, where
 10 a party seeking to vacate an arbitration award also asks the court essentially to reopen the
 11 claim and grant a remedy that satisfies the jurisdictional minimum, subject matter diversity
 12 jurisdiction exists even if the dollar amount of the challenged award is zero.

13 Here, it is not mere supposition, but a certainty, that DSD seeks to reopen the Final
 14 Award and obtain monetary relief in excess of the jurisdictional minimum. DSD filed
 15 precisely that motion in the Wisconsin Court Action, and is simply doing a procedural
 16 forum-shopping tapdance in order to hold off filing that motion in this Court. (Indeed, DSD
 17 admits in its motion here that this action and the action in Wisconsin "are essentially
 18 identical." DSD's Motion, 8:19). DSD thus finds itself speaking out of both sides of its
 19 corporate mouth. Out of one side, DSD contends in its motion that the amount in
 20 controversy for purposes of confirmation of the Final Award is zero. But out of the other
 21 side, DSD admits, indeed insists, that the amount in controversy is the "corrected" award in
 22 the amount of \$1.7 Million. DSD is judicially (and ethically) estopped from contending that
 23 judicial review of the Final Award does not meet the amount in controversy requirement.

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25 **IV.**

26 **ABSTENTION IS NOT APPROPRIATE**

27 Instead, it was the amount at issue in the underlying arbitration. Thus, *Theis* does not hold that the amount
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1 **A. Confirmation (or Vacatur) of the Final Award Implicates Important *California*
2 Interests**

3 The Distribution Agreement provides that it shall be governed by California law.
4 Distribution Agreement, § 18, Exhibit 2 to Schierling Decl. #1. Thus, California law (or
5 federal law), ***but not Wisconsin law***, controls enforcement of the Final Award.⁶

6 California's Arbitration Act embodies the strong public policy of California. *Valsan*
7 *Partners Ltd. Partnership v. Calcor Space Facility* (1994) 25 Cal.App.4th 809, 816. DSD's
8 motion here seeks to thwart that policy. DSD already attempted once to sidestep its
9 obligation to arbitrate in California, and its present strategy of attacking jurisdiction in
10 California so that it can instead challenge the ***California*** arbitration award in Wisconsin is
11 simply more of the same.

12 **B. There Are No On-Going State Proceedings In Wisconsin**

13 DSD should not derive any advantage from its preemptive rush to court in Wisconsin
14 in July 2007 because DSD made that tactical move in blatant violation of its obligation to
15 arbitrate pursuant to the Distribution Agreement. DSD's intentional disregard for its
16 contractual agreement was all the more unjustified considering arbitration proceedings were
17 already underway in California when DSD ran to court. Appropriately, the Wisconsin court
18 held DSD to its contract and stayed the Wisconsin Court Action to permit arbitration in
19 California. The Wisconsin Court Action remained in abeyance until DSD attempted once
20 again—by filing its motion for partial vacation of the Final Award—to secure a home court
21 advantage that it validly waived when it agreed to arbitrate in California under California
22 law.⁷

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25 of the arbitration award is the amount in controversy.

26 ⁶ In accordance with California conflicts-of-laws principles, because the WFDL embodies fundamental
27 public policy of Wisconsin, the Arbitrator disregarded the California choice of law provision to the limited
28 extent that the WFDL conflicts with California law, i.e., on the issue of protection against termination of
the distributorship. See Exhibit 1 to Schierling Decl., a copy of DSD's motion for partial vacation,
specifically, Exhibit "F" to the Affidavit of Julie Lewis, a copy of the Arbitrator's decision on the choice of
law issue.

7 ⁷ DSD's complaints about the inconvenience of a California forum carry no weight. DSD, a long standing
established commercial enterprise, agreed to resolve its disputes in arbitration in California. In doing so, it

1 DSD argues that this matter involves Wisconsin public policy and suggests that the
 2 Wisconsin court has an active interest in reviewing the Final Award. No one could speak
 3 with more authority to refute these contentions than Judge Forbeck himself, and he has done
 4 so loud and clear. Judge Forbeck believes that "hearing[s] . . . regarding the arbitrator's
 5 decision" should take place here, in this Court, "without intervention" by the Wisconsin
 6 court. Judge Forbeck has expressly and unequivocally abstained and deferred to this Court.

7 In short, arbitral review of the Final Award does not implicate important Wisconsin
 8 state interests of Wisconsin and there are no ongoing state proceedings in Wisconsin. Thus,
 9 abstention is not warranted. Arbitration is meant to achieve a speedy and relatively
 10 inexpensive means of dispute resolution. Hansen urges this Court to give effect to that
 11 purpose by dismissing DSD's motion and setting a briefing schedule on Hansen's petition to
 12 confirm the Final Award.

13 **V.**

14 **CONCLUSION**

15 This case belongs here in California, before this Court. The Wisconsin State Court
 16 agrees. DSD's motion must fail.

17 DATED: May 23, 2008

SOLOMON WARD SEIDENWURM & SMITH, LLP

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By: /s/ Tanya M. Schierling

20 RICHARD E. MCCARTHY

TANYA M. SCHIERLING

21 Attorneys for Petitioner Hansen Beverage
 Company

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26 consented to jurisdiction and waived any objection to a California forum. See Code Civ. Proc. § 1293
 ("[t]he making of an agreement in this State providing for arbitration to be had within this State shall be
 deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such
 agreement by making any orders provided for in this title and by entering of judgment on an award under
 the agreement.").

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CERTIFICATE OF SERVICE

2 I caused the **HANSEN BEVERAGE COMPANY'S OPPOSITION TO MOTION TO**
3 **DISMISS OR STAY PETITION TO CONFIRM ARBITRATION AWARD** to be served in the
4 following manner:

Electronic Mail Notice List

6 The following are those who are currently on the list to receive e-mail notices for this
7 case.

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